legislation aimed at it, even though some abuses may not be hit. *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411; *Bryant* v. *Zimmerman*, 278 U. S. 63, 73. It is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs.

Affirmed.

BROMLEY *v.* McCAUGHN, COLLECTOR OF INTERNAL REVENUE.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 27. Argued October 31, 1929.—Decided November 25, 1929.

1. The tax imposed by Revenue Act of 1924, §§ 319–324, as amended by Revenue Act of 1926, § 324, upon transfers of property by gift, is not a direct tax within the meaning of the Constitution, but an excise on the exercise of one of the powers incident to ownership, and need not be apportioned. Const., Art. I, §§ 2, 8, 9. P. 135.
2. The uniformity of taxation throughout the United States enjoined by Art. I, § 8, is geographic, not intrinsic. P. 138.
3. The graduations of the tax, and the exemption of gifts aggregating $50,000, gifts to any one person that do not exceed $500, and certain gifts for religious, charitable, educational, scientific and like purposes, are consistent with the uniformity clause, and with the due process clause of the Fifth Amendment. *Id.*
4. The schemes of graduation and exemption in the statute, by which the tax levied upon donors of the same total amounts may be affected by the size of the gifts to individual donees, are not so arbitrary and unreasonable as to deprive the taxpayer of property without due process. P. 139.

ANSWERS to questions certified by the Circuit Court of Appeals upon review of a judgment for the Collector in a suit by Bromley, a resident of the United States, to recover a tax alleged to have been illegally levied upon gifts made by him.

Mr. Ira Jewell Williams, with whom *Messrs. Ira Jewell Williams, Jr.,* and *Francis Shunk Brown* were on the brief, for Bromley.

I. The gift tax is a direct tax, and hence void because unapportioned.

It should be noted that the words "or other direct" (in Art. I, § 9, cl. 4,) did not appear in the first draft of the Constitution, but were inserted so as to make it clear that Congress had no power to lay direct taxes without apportionment.

A tax upon income is a direct tax (*Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; 158 U. S. 601) permitted only because the Sixteenth Amendment removed the prohibition against the levying of that particular tax. *Eisner* v. *Macomber,* 252 U. S. 189.

That the gift tax is not an income tax (it is payable by the donor), and is not apportioned, is so obvious as not to require argument.

Making a gift is a right, not a privilege. Whether one regards "property" as the sum of the legal rights of the owner in respect of the object; or whether one regards the rights incident to ownership of property as necessarily flowing from the nature of the legal concept of "property"—in either case the faculty of making a gift is one of the rights of the owner of property. 1 Wend. Blackstone's Commentaries, c. 1, p. 138; *Todd* v. *Wick Bros.,* 36 Oh. St. 370; *Chicago & W. I. R. Co.* v. *Englewood Connecting R. Co.,* 115 Ill. 375; *Jaynes* v. *Omaha Street R. Co.,* 53 Neb. 631; *Smith* v. *Campbell,* 10 N. C. 595; *Eaton* v. *B. C. & M. R. Co.,* 51 N. H. 504; *Buchanan* v. *Warley,* 245 U. S. 60.

Of course the whole is the sum of all its parts; and if the Constitution protects property, it protects each of the incidents thereof. The gift tax, since it is a tax upon an essential right inherent in property, is a tax upon prop-

erty, and is therefore direct. A tax upon property, as slaves, is a direct tax. *Springer* v. *United States,* 102 U. S. 586.

Even if the tax be only upon the income from property, still it is a tax upon property. *Pollock* v. *Farmers' Loan & Trust Co., supra.*

So, a tax upon liquor is a tax upon property, even though the tax be disguised as an excise tax upon the "business" of withdrawing liquor from warehouses. *Dawson* v. *Kentucky Distilleries,* 255 U. S. 288. See *Thompson* v. *Kreutzer,* 112 Miss. 165; *Buchanan* v. *Warley,* 245 U. S. 60; *People* v. *Otis,* 90 N. Y. 48.

The right to use and to enjoy one's property comprehends the right of gift. The right of gift is part and parcel of all the other elements of property, and is one of the most deeply rooted.

The argument that unless all the incidents of property are taxed, the tax is not direct, is unsound. It is opposed to the principle of the *Pollock* case and the *Dawson* case, that a tax upon any one of the essential incidents of property is a tax upon property.

If a tax may be laid on one essential attribute of property because that attribute is not the only one, then there is no limit worthy the name to the power to tax property. Idle property may be taxed because it is idle. One's own home may be taxed because one is living in it. Lands planted to certain crops may be taxed—because there are "other useful purposes" to which the land could be put. To receive income from property is not the sole use to which property can be put. Yet a tax on income from property is a tax on property itself.

If the remunerative business use of property—putting money out at interest—owning and receiving the interest on securities; receiving the rental from property—could not be taxed except for the Sixteenth Amendment, be-

cause that would be to tax the property itself, *a fortiori* a non-business, non-remunerative, purely social use of property, that is, the exercise of the primitive right to give it away, may not be taxed, for that would be to tax the property itself. Analyzing and refuting *Anderson* v. *McNeir,* 16 F. (2d) 970.

The theory that there cannot be a taking of property unless the property is taken *in toto*—that a tax on an ordinary user of an indispensable attribute of property is not a tax on property unless it excludes every other user—is wholly untenable. Any serious diminution of the enjoyment of property is a "taking." *Portsmouth Co.* v. *United States,* 260 U. S. 327; *Peabody* v. *United States,* 231 U. S. 531.

Likewise, there can be a taxing of property without a taxing of all the attributes of property, or excluding every other possible user. A tax on the use of land for agricultural products would not preclude all other uses of the property, yet it would be a tax on property. Is not "keeping" a use—the right to decide not to spend, or invest, or give away? One may spend, trade, hoard or give. All these may be regarded as "uses." One may keep, or part with by spending, or by investing or giving. The owner of whiskey has a right to hoard it. That might be one use; but he may not be taxed by a State on the "business" of withdrawing it. *Dawson* v. *Kentucky Distilleries, supra.*

Investing is a use. Could there be a graduated excise tax on spending? Land lying fallow may be said to be "used." Could there be a valid "excise" tax on unused land?

Courts have rarely attempted to define direct or indirect taxes, but have preferred to decide in each case as it arose. The true rule is that the nature of the tax depends upon the nature of the thing taxed. If the tax

is a tax upon a person or upon property, it is a direct tax; if on a privilege, it is an excise and is indirect.

Indirect taxes can be divided into three classes: (a) inheritance taxes; *New York Trust Co.* v. *Eisner,* 256 U. S. 345; (b) business taxes; *Pacific Ins. Co.* v. *Soule,* 7 Wall. 433; *Veazie Bank* v. *Fenno,* 8 Wall. 523; *Nicol* v. *Ames,* 173 U. S. 509; *Treat* v. *White,* 181 U. S. 264; *Patton* v. *Brady,* 184 U. S. 608; *Thomas* v. *United States,* 192 U. S. 363; *Spreckels Sugar Co.* v. *McClain,* 192 U. S. 395; *McCray* v. *United States,* 195 U. S. 27; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; (c) luxury taxes; *Patton* v. *Brady,* 184 U. S. 608; *McCray* v. *United States,* 195 U. S. 27; *Billings* v. *United States,* 232 U. S. 261; *Hylton* v. *United States,* 3 Dall. 171.

Business taxes seem to have been held to be indirect for three reasons: (1) because most of them were technically taxes on some activity which the Government might well have had the power to regulate under some conferred power other than the power to tax; (2) because technically the tax need not be assumed, since doing the act taxed was a matter of volition of the person concerned; and (3) on the ground that the tax could be shifted to the ultimate consumer, who thus paid the tax indirectly in the form of an increased price for some article of consumption.

It is impossible too strongly to emphasize that indirect taxes are essentially business taxes. Except for inheritance taxes and an isolated instance or two of luxury taxes, every kind of indirect tax is connected in some way with some matter of business, as that word is commonly understood, from the simple transaction of a sale of real estate to the most complicated form of occupation tax. The business element is ever present. It is obvious that the gift tax is not in any sense a business tax.

This Court intimated in *Nicol* v. *Ames,* 173 U. S. 509, that a general tax on all sales would be direct.

Hylton v. *United States,* 3 Dall. 171, was fully analyzed and considered in the majority opinions in the *Pollock* cases. If a tax on property is not a direct tax, then a tax on the income from property could not be a direct tax. The carriage tax was sustained by Mr. Justice Chase (p. 175) as a tax on "expense . . . on . . . a consumable commodity." The tax here is not in any sense a tax on an expense.

II. The tax is arbitrary and unreasonable because graduated and otherwise lacking in uniformity. *Schlesinger* v. *Wisconsin,* 270 U. S. 230.

As applied to gifts, a graduated excise is a plain abomination. Graduation is not uniformity; uniformity here means sameness. If a man who owned 100 acres were placed in a different class and taxed at a rate twice as high as his neighbor owning fifty acres, would he have the equal protection of the laws? *Myles Salt Co.* v. *Drainage District,* 239 U. S. 478; *Gast Realty Co.* v. *Schneider Granite Co.,* 240 U. S. 55; *Cope's Estate,* 191 Pa. 1; *Smith* v. *Loughman,* 245 N. Y. 486.

If a general sales tax were passed taxing only sales over $500, and graduated so as to hit hardest the largest concerns, would such a tax, state or federal, be valid as "due process" or "equal protection"?

The gift tax taxes part of the remaining capital of the giver in a ratio graduated according to his generosity. Moreover, the act discriminates between residents and non-residents. A resident citizen is allowed a general exemption of $50,000. No such exemption is allowed to a non-resident. On the other hand, there is a discrimination against the resident citizen. He is taxed on all transfers of "property wherever situated," while the non-resident citizen is taxed only on transfers of "property situated within the United States."

In addition the tax makes an arbitrary discrimination based upon the amount of individual gifts. "Gifts the

aggregate amount of which to any one person does not exceed $500" per annum are exempt. $51,000 may be equally divided among 102 people without tax. If divided amongst 101 persons, the donor is taxable. The foregoing would seem to be not only unreasonable, but reasonless.

The same rule as to equality as inherent in the nature of a tax must apply alike to state legislatures and to Congress. Unreasonable, arbitrary classification violates "due process" quite as much as it violates the equal protection clause. Cf. the *Pollock* case, 157 U. S. at p. 504, and pp. 595–6.

This salutary rule applies with equal force to an attempt to graduate so-called "taxes" according to the size of the subject matter irrespective of any difference in nature or quality. *Frost* v. *Corp'n Comm'n,* 278 U. S. 515.

Solicitor General Hughes, with whom *Messrs. Sewall Key* and *J. Louis Monarch,* Special Assistants to the Attorney General, were on the brief, for McCaughn.

I. The tax upon transfers of property by gift is not a direct tax but an excise.

The decisions of this Court afford no precise definition of a direct tax, but it was early settled that the term includes a capitation tax and a tax upon land. Prior to *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429; 158 U. S. 601, it was thought that those were the sole instances of the direct tax referred to in the Constitution. *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1. It has now become established that the constitutional rule of apportionment had its origin in the purpose to require that taxes on persons solely because of their general ownership of property should be levied upon the States in proportion to their population, and that there is no sound distinction between a tax levied on a person solely by reason of his general ownership of real property and the same tax imposed solely because of his general ownership

of personal property. It is also settled that a tax on the income derived from either real or personal property is the legal equivalent of a direct tax on the property from which the income is derived. *Pollock* v. *Farmers' Loan & Trust Co., supra; Knowlton* v. *Moore,* 178 U. S. 41.

But the tax in this case is not a direct tax growing out of the general ownership of property, but is a tax upon a particular use of that property. It is not a tax directly upon the existence of the right to use the property, but a tax upon the exercise of that right. *Knowlton* v. *Moore, supra.*

That there is a substantial difference between the passive right and the active exercise of that right is shown by *Billings* v. *United States,* 232 U. S. 261; *Pierce* v. *United States,* 232 U. S. 290.

The following have been sustained as indirect taxes:

Taxes on particular types of sales: *Nicol* v. *Ames,* 173 U. S. 509; *Thomas* v. *United States,* 192 U. S. 363; upon the use of carriages for the conveyance of persons: *Hylton* v. *United States,* 3 Dall. 171; upon the amount of notes paid out by any state bank: *Veazie Bank* v. *Fenno,* 8 Wall. 533; upon manufactured tobacco, having reference to its origin and intended use: *Patton* v. *Brady,* 184 U. S. 608; upon the manufacture and sale of colored oleomargarine: *McCray* v. *United States,* 195 U. S. 27; a succession tax upon the devolution of title to real estate: *Scholey* v. *Rew,* 23 Wall. 331; a tax on legacies: *Knowlton* v. *Moore,* 178 U. S. 41; taxes on doing business by particular methods: *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Spreckels Sugar Co.* v. *McClain,* 192 U. S. 397; *Stratton's Independence* v. *Howbert,* 231 U. S. 399; *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179; *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103.

See *Keeney* v. *New York,* 222 U. S. 525, and *Nichols* v. *Coolidge,* 274 U. S. 531.

Nor can it be doubted since *Knowlton* v. *Moore, supra,* and *New York Trust Co.* v. *Eisner,* 256 U. S. 345, that a tax may be indirect even though inevitable. Ability to shift the tax from the person upon whom it first falls is not a necessary element. No decision of this Court classifies as direct a tax imposed on a particular use of property. Distinguishing *Dawson* v. *Kentucky Distilleries,* 255 U. S. 288.

A tax upon the transfer of property by gift is not equivalent to a tax upon property because of its ownership. It does not interfere with "the only uses of which it is capable." There are many useful things which one may do with his property besides giving it away.

From the above-cited cases it appears that the use of property is distinguishable from the ownership of property and that indirect taxes may properly be based upon the use. *Nicol* v. *Ames,* 173 U. S. 509; *Billings* v. *United States,* 232 U. S. 261; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642.

After full consideration of the above cases, the gift tax has been sustained in *Blodgett* v. *Holden,* 11 F. (2d) 180; *Anderson* v. *McNeir,* 16 F. (2d) 970. Since this Court held the statute invalid as it was retroactively applied in *Blodgett* v. *Holden,* 275 U. S. 142, it was found unnecessary to answer the certified question dealing with the classification of the tax as direct or indirect. After the decision in that case, *Anderson* v. *McNeir, supra,* was reversed in this Court on confession of error, 275 U. S. 577, with the result that the classification of the tax has not yet been considered by this Court. *O'Connor* v. *Anderson,* 28 F. (2d) 873.

The only distinction between a gift and a devise is that the latter is a statutory, not a common-law privilege. It is difficult to formulate a reason why a tax upon the exercise of the right to make a sale of property differs in principle from a tax upon the exercise of the right to make a

gift of property. Cf. dissenting opinion in *Untermyer* v. *Anderson,* 276 U. S. 440.

The estate tax and the gift tax are *in pari materia* and progressively in execution of the power to raise revenue. This is not to use the power of taxation for an ulterior purpose, as in the *Child Labor Tax Case,* 259 U. S. 20. There can be no doubt that the gift tax was enacted by Congress as a means of making the estate tax effective. By splitting up large fortunes and making absolute gifts *inter vivos,* the estate tax was being avoided (65 Cong. Rec., Pt. 3, pp. 3119, 3120; Pt. 4, pp. 3170, 3172; Pt. 8, pp. 8094, 8097). Adequate provision was made for crediting the gift tax against the estate tax where the amount of the gift was later required to be included in a decedent's gross estate. (Rev. Act of 1924, § 322; and Rev. Act of 1928, § 404.)

The presumption in this case, of course, is in favor of the validity of the statute. And this presumption, repeatedly indulged, is particularly strong when considering a Revenue Act. *Nicol* v. *Ames,* 173 U. S. 509. This statute is an integral part of an entire taxing scheme considered necessary by Congress for satisfying the needs of the Government for revenue. A measure may be valid as a necessary adjunct to something which clearly lies within the legislative power, even though, standing alone, its constitutionality might have been subject to doubt. *Purity Extract Co.* v. *Lynch,* 226 U. S. 192; *Ruppert* v. *Caffey,* 251 U. S. 264; *Everard's Breweries* v. *Day,* 265 U. S. 545; *Taft* v. *Bowers,* 278 U. S. 470.

II. Progressive rates of taxation and proper exemptions violate no constitutional provisions applicable to federal taxation. *Knowlton* v. *Moore,* 178 U. S. 41; *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1; *Treat* v. *White,* 181 U. S. 264; *Patton* v. *Brady,* 184 U. S. 608; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Billings* v. *United States,* 232 U. S. 261; *Stanton* v. *Baltic Mining Co.,* 240

U. S. 103; *Tyee Realty Co.* v. *Anderson,* 240 U. S. 115; *High* v. *Coyne,* 178 U. S. 111; *Keeney* v. *New York,* 222 U. S. 525; *Barclay & Co.* v. *Edwards,* 267 U. S. 442; *Schlesinger* v. *Wisconsin,* 270 U. S. 230; *LaBelle Iron Works* v. *United States,* 256 U. S. 377; *Magoun* v. *Illinois Trust Co.,* 170 U. S. 299; *Burk-Waggoner Oil Ass'n* v. *Hopkins,* 269 U. S. 110.

The gift tax was imposed largely to prevent avoidance of the estate tax by gifts *inter vivos* and, accordingly, it was necessary to adjust the rates upon gifts to equalize the rates upon estates. This Congress has done. Compare §§ 301 and 319 of the Revenue Act of 1924. Avoidance of the estate tax could not be adequately prevented unless the gift tax provisions contained the same graduated rates.

The decision of this Court in *United States* v. *Goelet,* 232 U. S. 293, makes it clear that there is a difference in fact between resident and non-resident citizens; and the difference is so substantial that this Court held a tax levied upon "any citizen" can not be treated, without the expression of a more definite intent, as embracing the exceptional exertion of the power to tax one permanently residing abroad.

MR. JUSTICE STONE delivered the opinion of the Court.

In this case, pending in the Court of Appeals for the Third Circuit, that court has certified to this questions of law concerning which it asks instructions for the proper disposition of the cause. Judicial Code, § 239, as amended by Act of February 13, 1925.

Bromley, a resident of the United States, brought the present suit in the District Court for Eastern Pennsylvania, to recover a tax alleged to have been illegally exacted, upon gifts made by him after the effective date of § 319 of the Revenue Act of 1924 (43 Stat. 253, 313,

as amended by § 324 (a) of the Revenue Act of 1926, 44 Stat. 9, 86). This section imposes a graduated tax "upon the transfer by a resident by gift" during the calendar year "of any property wherever situated . . ." In computing the amount of the gift subject to the tax, § 321, in the case of a resident, exempts gifts aggregating $50,000, gifts to any one person which do not exceed $500, and certain gifts for religious, charitable, educational, scientific and like purposes. The questions certified are:

1. Are the provisions of Sections 319–324 of the Revenue Act of 1924, as amended by Section 324 of the Revenue Act of 1926, when applied to transfers of property by gift inter vivos, made after the effective dates of the cited Revenue Acts and not made in contemplation of death, invalid, because they violate (a) the third clause of Section 2 and (b) the fourth clause of Section 9 of Article 1 of the Constitution in that the tax they impose is a direct tax and has not been apportioned?

2. Are the cited provisions, when applied to transfers of property made in like circumstances, invalid because they violate (a) the Fifth Amendment to the Constitution and (b) the first clause of Section 8 of Article 1 of the Constitution in that they impose a tax which is graduated and subject to exemptions and therefore lacks uniformity, and also deprive a person of his property without due process of law?

1. The first question was mooted by counsel, but not decided, in *Blodgett* v. *Holden*, 275 U. S. 142, and *Untermyer* v. *Anderson*, 276 U. S. 440. The general power to "lay and collect taxes, duties, imposts and excises" conferred by Article I, § 8 of the Constitution, and required by that section to be uniform throughout the United States, is limited by § 2 of the same article, which requires "direct" taxes to be apportioned, and § 9, which provides that "no capitation or other direct tax shall be laid unless in proportion to the census" directed by the Constitution

to be taken. As the present tax is not apportioned, it is forbidden if direct.

The meaning of the phrase "direct taxes" and the historical background of the constitutional requirement for their apportionment have been so often and exhaustively considered by this Court, *Hylton* v. *United States,* 3 Dall. 171; *Pollock* v. *Farmers Loan & Trust Company,* 157 U. S. 429, 158 U. S. 601; *Knowlton* v. *Moore,* 178 U. S. 41; *Nicol* v. *Ames,* 173 U. S. 509, 515, that no useful purpose would be served by renewing the discussion here. Whatever may be the precise line which sets off direct taxes from others, we need not now determine. While taxes levied upon or collected from persons because of their general ownership of property may be taken to be direct, *Pollock* v. *Farmers Loan & Trust Company,* 157 U. S. 429, 158 U. S. 601, this Court has consistently held, almost from the foundation of the government, that a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise which need not be apportioned, and it is enough for present purposes that this tax is of the latter class. *Hylton* v. *United States, supra,* cf. *Veazie Bank* v. *Fenno,* 8 Wall. 533; *Thomas* v. *United States,* 192 U. S. 363, 370; *Billings* v. *United States,* 232 U. S. 261; *Nicol* v. *Ames, supra; Patton* v. *Brady,* 184 U. S. 608; *McCray* v. *United States,* 195 U. S. 27; *Scholey* v. *Rew,* 23 Wall. 331; *Knowlton* v. *Moore, supra;* see also *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397; *Stratton's Independence* v. *Howbert,* 231 U. S. 399; *Doyle* v. *Mitchell Brothers Co.,* 247 U. S. 179, 183; *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103, 114.

It is a tax laid only upon the exercise of a single one of those powers incident to ownership, the power to give the property owned to another. Under this statute all the other rights and powers which collectively constitute

property or ownership may be fully enjoyed free of the tax. So far as the constitutional power to tax is concerned, it would be difficult to state any intelligible distinction, founded either in reason or upon practical considerations of weight, between a tax upon the exercise of the power to give property *inter vivos* and the disposition of it by legacy, upheld in *Knowlton* v. *Moore, supra,* the succession tax in *Scholey* v. *Rew, supra,* the tax upon the manufacture and sale of colored oleomargarine in *McCray* v. *United States, supra,* the tax upon sales of grain upon an exchange in *Nicol* v. *Ames, supra,* the tax upon sales of shares of stock in *Thomas* v. *United States, supra,* the tax upon the use of foreign built yachts in *Billings* v. *United States, supra,* the tax upon the use of carriages in *Hylton* v. *United States, supra;* compare *Veazie Bank* v. *Fenno, supra,* 545, *Thomas* v. *United States, supra,* 370.

It is true that in each of these cases the tax was imposed upon the exercise of one of the numerous rights of property, but each is clearly distinguishable from a tax which falls upon the owner merely because he is owner, regardless of the use or disposition made of his property. See *Billings* v. *United States, supra;* cf. *Pierce* v. *United States,* 232 U. S. 290. The persistence of this distinction and the justification for it rest upon the historic fact that taxes of this type were not understood to be direct taxes when the Constitution was adopted and, as well, upon the reluctance of this Court to enlarge by construction, limitations upon the sovereign power of taxation by Article I, § 8, so vital to the maintenance of the National Government. *Nicol* v. *Ames, supra,* 514, 515.

It is said that since property is the sum of all the rights and powers incident to ownership, if an unapportioned tax on the exercise of any of them is upheld, the distinction between direct and other classes of taxes may be wiped out, since the property itself may likewise be taxed by resort to the expedient of levying numerous taxes upon its

uses; that one of the uses of property is to keep it, and that a tax upon the possession or keeping of property is no different from a tax on the property itself. Even if we assume that a tax levied upon all the uses to which property may be put, or upon the exercise of a single power indispensable to the enjoyment of all others over it, would be in effect a tax upon property, see *Dawson* v. *Kentucky Distilleries & Warehouse Co.*, 255 U. S. 288, and hence a direct tax requiring apportionment, that is not the case before us.

The power to give cannot be said to be a more important incident of property than the power to use, the exercise of which was taxed in *Billings* v. *United States,* and even though differences in degree may be carried to a point where they produce distinctions in kind, the present levy falls so far short of taxing generally the uses of property that it cannot be likened to the taxes on property itself which have been recognized as direct. It falls, rather, into that category of imposts or excises which, since they apply only to a limited exercise of property rights, have been deemed to be indirect and so valid although not apportioned.

2. The uniformity of taxation throughout the United States enjoined by Article I, § 8, is geographic, not intrinsic. A graduated tax, on legacies, granting exemptions, *Knowlton* v. *Moore, supra,* or on incomes, *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, does not violate this clause of the Constitution, nor are such taxes infringements on the Fifth Amendment. *Knowlton* v. *Moore, supra,* p. 109; *Brushaber* v. *Union Pacific R. Co., supra,* pp. 24, 25. Graduated taxes on inheritances or successions, with provisions for exemptions, have so often been upheld as not violating either the due process or the equal protection clauses of the Fourteenth Amendment, *Stebbins* v. *Riley,* 268 U. S. 137, as to leave little ground for supposing that taxation by Congress embracing these

features, and otherwise valid, could be deemed a denial of the due process clause of the Fifth. See *Van Oster* v. *Kansas,* 272 U. S. 465, 468.

It is suggested that the schemes of graduation and exemption in the present statute, by which the tax levied upon donors of the same total amounts may be affected by the size of the gifts to individual donees, are so arbitrary and unreasonable as to deprive the taxpayer of property without due process. But similar features of state death taxes have been held not to infringe the Fourteenth Amendment since they bear such a relation to the subject of the tax as not "to preclude the assumption that the legislature, in enacting the statute, did not act arbitrarily or without the exercise of judgment and discretion which rightfully belong to it." *Stebbins* v. *Riley, supra,* p. 145. No more can they be a basis for holding that the graduation and exemption features of the present statute violate the Fifth Amendment.

The answer to both questions is, No.

Opinion of MR. JUSTICE SUTHERLAND, dissenting, delivered by MR. JUSTICE BUTLER.

In the convention which framed the Constitution, Mr. King on one occasion asked what was the precise meaning of "direct taxation," and Mr. Madison informs us that no one answered. That Mr. Madison took the pains to record the incident indicates that it challenged attention but that no one was able to formulate a definition. And though we understand generally what is a direct tax and what taxes have been declared to be direct, we are still as incapable of formulating an exact definition as were those who wrote the taxation clauses into the Constitution. Since the *Pollock* case, however, we know that a tax on property, whether real or personal, or upon the income derived therefrom, is direct; and that to levy a tax by reason of ownership of property is to

tax the property. *Dawson* v. *Kentucky Distilleries Co.*, 255 U. S. 288, 294.

The right to give away one's property is as fundamental as the right to sell it or, indeed, to possess it. To give away property is not to exercise a separate element or incident of ownership, like the use of a carriage, but completely to sever the donor's relation to the property and leave in him no element or incident of ownership whatsoever. Reasonably it cannot be doubted that the power to dispose of property according to the will of the owner is a property right. If a tax upon the sale of property, irrespective of special circumstances, is a direct tax, it is clear that a tax upon the gift of property, irrespective of special circumstances, is, likewise, direct. In my opinion, both are direct because they are in substance and effect not excise taxes but taxes upon property. By repeated decisions of this Court it has become axiomatic that it is the substance and not the form that controls in such matters.

Brown v. *Maryland*, 12 Wheat. 419, involved the validity of a state statute which exacted a license fee of $50 of importers of foreign goods and other persons selling the same by wholesale, bale or package, etc. The act was held void as imposing a duty on imports. It was argued that the tax was not upon the article but upon the person; that the state had the power to tax occupations, and this was nothing more. To this Chief Justice Marshall replied (p. 444) in words that have been repeatedly approved in subsequent decisions of this Court:

"It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

In *Cook* v. *Pennsylvania,* 97 U. S. 566, it was held that a tax on the amount of sales made by an auctioneer was a tax upon the goods sold, and where these goods were imported in the original package and sold for the importer the law authorizing the tax was void.

Nicol v. *Ames,* 173 U. S. 509, is not to the contrary of these cases, but in complete accord with them. There it was held that a tax levied upon a sale of property effected at a board of trade or exchange was an excise laid upon the privilege, opportunity or facility afforded by boards of trade or exchanges for the transaction of the business and not upon the property *or the sale thereof,* which, it was conceded, would be a direct tax and void without apportionment. Brief quotations from the opinion will make the distinction clear. Referring to the cases which had been cited against the tax, including *Brown* v. *Maryland, supra,* and the *Pollock* case, it was said that all these cases involved the question whether the taxes assailed were in effect taxes upon property and (p. 519): "If this tax is not on the property *or on the sale thereof,* then these cases do not apply." At p. 520, answering the contention that the tax was one on the property sold, it was said: "It is not laid upon the property at all, nor upon the profits of the sale thereof, nor upon the sale itself considered separate and apart from the place and the circumstances of the sale." And finally at p. 521, the Court said in words that admit of no mistake: "A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale differs radically from a tax upon every sale made in any place. *The latter tax is really and practically upon property.* It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded."

To me it seems plain that a tax imposed upon an ordinary gift, to be measured by the value of the property

given and without regard to any qualifying circumstances, is a tax by indirection upon the property, as much, for example, as a tax upon the mere possession by the owner of a farm, measured by the value of the land possessed, would be a tax on the land. To call either of them an excise is to sacrifice substance to a mere form of words. I think, therefore, the first question certified, without stopping to consider the second, should be answered in the affirmative.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE BUTLER concur in this opinion.

EX PARTE NORTHERN PACIFIC RAILWAY COMPANY ET AL.

ON PETITION FOR A WRIT OF MANDAMUS.

No. 21, Original. Return to rule presented November 25, 1929.—Decided December 2, 1929.

In a suit in the District Court to restrain state officers, by interlocutory and permanent injunctions, from enforcing an order affecting railway rates upon the ground that the order conflicts with the Federal Constitution and laws, when the plaintiffs apply for an interlocutory injunction on that ground and the district judge grants a temporary restraining order to be effective until such application shall be determined, it is his duty under Jud. Code, § 266, U. S. C. Title 28, § 380, immediately to call two other judges, one of whom shall be a circuit justice or a circuit judge, to assist him in hearing and determining such application, and neither he, nor another district judge, in the presence of such application and when it is being pressed, has jurisdiction, sitting alone, to entertain a motion by the defense to dissolve the temporary restraining order or a motion by the defense to dismiss the bill, or jurisdiction to dismiss the bill on the merits. P. 144.

PETITIONS for a rule directing the Honorable George M. Bourquin and the Honorable Charles N. Pray, judges of the District Court for the District of Montana, and the